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IN THE

Supreme Court of the United States

October Term, 1958

No. 756

DON McCULLAGH, INC., a Michigan corporation,
Appellant,
v.
STATE OF MICHIGAN, DEPARTMENT OF REVENUE,
Appellee.

Appeal from the Supreme Court of the State of Michigan

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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BRIEF IN OPPOSITION TO MOTION TO DISMISS[1]

The appellee, State of Michigan, Department of Revenue, has filed a motion to dismiss the appeal on the grounds:

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[1] Numbers in parentheses refer to pages of Jurisdictional Statement unless otherwise indicated.

(1) that the appeal does not present a substantial federal question and

(2) that appellant is not a proper party to raise any federal question.

STATEMENT OF THE CASE

This is an action against appellee to recover sales taxes in the sum of $7,694.97 (2a), paid by appellant upon the sale by it of 154 new automobiles to General Car Leasing, Inc., a Michigan corporation, which were purchased by General Car Leasing, Inc., for leasing to Couture Motor Corporation, a Florida corporation, for use in Couture Motor Corporation's rent-a-car business in Miami, Florida. The sale price was $256,519.10 and the sales tax was assessed at the rate of 3% (1a).

The Michigan sales and use tax acts provide that sales for leasing intrastate and leasing intrastate for seven consecutive days or more are exempt from sale taxes when the rental receipts are taxable. The tax upon rental receipts is 3%. Similar sales for leasing interstate and leasing interstate are subject to sales tax of 3% of the sale price. The total aggregate rental received by General Car Leasing, Inc., from Couture Motor Corporation was $102,189.10 (2a), and if Couture Motor Corporation had used said automobiles in Michigan instead of Florida, the total tax upon the sale and leasing would have been $3,065.67, calculated at the rate of 3% of the rental receipts payable by the lessor, General Car Leasing, Inc., as and when the rental was collected (17a), instead of $7,694.97, as assessed and paid by the vendor herein.

Appellee, in its motion to dismiss, says that the rental received by General Car Leasing, Inc., from Couture Motor Corporation is unknown. This contention was not urged in either of the lower courts. It is groundless. The stipulation of facts in paragraph 5 H provides:

> "That all of said motor vehicles were leased for a period longer than seven consecutive days by General Car Leasing, Inc. to Couture Motor Corporation, said rental commencing five days after the automobiles left Detroit, Michigan, and that Couture Motor Corporation paid General Car Leasing, Inc. upon the leasing of said automobiles the sum of $102,189.10. (Defendant objects to this subparagraph upon the grounds of immateriality and irrelevancy)."

The trial court found:

> "It (Couture Motor Corporation) paid General Car Leasing $55 per month for each automobile and during the term of the lease paid General Car Leasing a total of $102,189.10" (14a).

The trial court further said:

> "The tax imposed in this case is also discriminatory in another manner. The State is this instance imposed a tax of $7,694.97. Had the lease been performed in Michigan the use tax upon rental receipts would have been $3,065.67. Thus a tax is here imposed in the sum of $7,694.97 (subject also to a Florida use tax, if any) because interstate commerce followed the sale, while the tax would have been only $3,065.67 if intrastate commerce had followed the sale. Here again interstate commerce is discriminated against in favor of intrastate commerce" (17a).

The Supreme Court of Michigan found:

> "The rental was payable monthly, the aggregate amount so paid being $102,189.10" (2a).

Said Court further said:

> "In the case at bar the amount of the sales tax paid by plaintiff exceeds what the use tax would have been had it been payable in Michigan" (11a).

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL

This Court, on February 24, 1959, decided *Portland Cement Co. v. Minnesota*, 3 L. ed 2d 421, wherein the Court said at page 427:

> "Nor may a State impose a tax which discriminates against interstate commerce either by providing a direct commercial advantage to local business, *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U. S. 389, 96 L. ed. 436, 72 S. Ct. 424 (1952); *Nippert v. Richmond*, 327 U. S. 416, 90 L. ed. 760, 66 S. Ct. 586, 66 S. Ct. 586, 162 A. L. R. 844 (1946), or by subjecting interstate commerce to the burden of 'multiple taxation,' *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U. S. 157, 98 L. ed. 583, 74 S. Ct. 396 (1954); *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307, 82 L. ed. 1365, 58 S. Ct. 913, 117 A. L. R. 429 (1938). Such impositions have been stricken because the States, under the Commerce Clause, are not allowed 'one single-tax worth of direct interference with the free flow of commerce.' *Freeman v. Hewitt*, 329 U. S. 249, 256, 91 L. ed. 265, 274, 67 S. Ct. 274 (1946)."

Can it be contended that interstate commerce is not discriminated against and is not exposed to multiple burdens when

(1) no sales tax would have been assessed or payable by the appellant vendor if the lease had been an intrastate lease instead of an interstate lease;

(2) sales tax of $7,694.97 is imposed upon appellant which would not have been imposed if the lease had been intrastate instead of interstate; and

(3) no tax other than $3,065.67 would have been assessable to General Car Leasing, Inc., lessor, if the lease had been intrastate instead of interstate?

Appellee urges that appellant fails to raise a substantial federal question and cites as authorities for its conclusion:

General American Tank Car Corporation v. Day, 270 U. S. 367;
Gregg Dyeing Co. v. Query, 286 U. S. 472;
Heneford v. Silas Mason Co., 300 U. S. 577;
Allied Stores of Ohio, Inc. v. Bower, 3 L. ed 2d 480.

In *General American Tank Car Corporation v. Day*, 270 U. S. 367, it was held that a method of *ad valorem* taxation imposed upon non-residents which was different from that imposed upon residents did not violate due process or the equal protection clauses in the absence of a showing that it was discriminatory.

In *Gregg Dyeing Co. v. Query*, 286 U. S. 472, this Court sustained a non-discriminatory South Carolina statute which imposed a tax after interstate commerce had ended upon the use of gasoline brought into the state which tax was equal to the tax imposed upon locally produced gasoline. Chief Justice Hughes carefully pointed out that the tax in question was not at all discriminatory because of

the origin of the gasoline, inasmuch as locally produced gasoline bore the same tax burden.

Henneford v. Silas Mason Co., 300 U. S. 577, sustained the power of a state to impose a use tax upon the use of property brought into the state.

In *Allied Stores of Ohio, Inc. v. Bower*, 3 L. ed 2d 480, appellant, a resident of Ohio, challenged an Ohio statute which exempted from *ad valorem* taxes merchandise of a non-resident stored in the state, and subjected to said tax the merchandise of a resident stored within the state. It was held that appellant was a proper party to question the validity thereof under the equal protection clause, and that the statute did not violate the equal protection clause because it was a reasonable classification based upon the consideration that its purpose was to induce non-residents to locate their business within the state. The Court further pointed out that a non-resident could not be discriminated against under authority of *Wheeling Steel Corporation v. Glander*, 337 U. S. 562.

The aforementioned authorities do not sustain appellee's position. They do not sustain a discriminatory tax by reason of interstate commerce; namely, the imposition of sales tax upon sales for interstate leasing which is not imposed upon the same sales for intrastate leasing, nor do said cases sanction a tax 2½ times greater than that which would have been imposed if the leasing had been intrastate commerce instead of interstate commerce.

Appellee urges that the use tax is supplementary and complementary to the sales tax and it therefore should be sustained. This Court has held on many occasions that regardless of the name or characterization of the questioned statutes, they violate the commerce clause if in their practical application they discriminate against interstate

commerce or expose interstate commerce to multiple burdens. *Best & Co. v. Maxwell*, 311 U. S. 454 (15, 16).

Leasing of tangible personal property beyond state lines constitutes interstate commerce. *Benderup v. Pathe Exchange*, 263 U. S. 291.

There can be no question that a state may tax rentals derived from chattels rented within its boundaries.

Gregg Dyeing Co. v. Query, 286 U. S. 472;
Henneford v. Silas Mason Co., 300 U. S. 577;
Freeman v. Hewitt, 329 U. S. 249.

Appellee urges that because Florida did not tax the rental receipts, the Michigan statutes do not expose commerce to additional or multiple burdens in violation of the commerce clause. In so contending, appellee entirely ignores the discriminatory tax here imposed by reason of interstate leasing. If the leasing had been intrastate leasing, the tax imposed upon the lessor would have been $3,065.67, and no sales tax would have been imposed upon appellant, vendor. Because the leasing was interstate rather than intrastate, appellant is taxed $7,694.97.

The test as to whether or not commerce is exposed to additional or multiple burdens is whether another state could impose such a burden although it may not in fact have done so.

J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307;
Gwin, White and Prince v. Henneford, 305 U. S. 434;
Freeman v. Hewitt, 329 U. S. 249;
Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U. S. 157.

Each state is at liberty to determine its own tax policy without any interference by any other state. A state has no power to impose a tax because another state chooses not to impose such a tax. A state tax statute cannot stand the test of constitutionality upon the theory that another state has not imposed a like or similar tax which it had the power to impose. State statutes must stand or fall upon the power of the state to impose and are not in the lease dependent upon what another state has done. The absurdity of appellee's contention that because Florida has not imposed a tax upon rentals, interstate commerce is not exposed to multiple burdens becomes plainly apparent upon consideration of such a theory. According to appellee's theory, the tax would not violate the commerce clause if the state of actual rental did not tax the rental, but it would violate the commerce clause if the state of rental did tax the rental receipts. Thus, the leasing in New York City which does tax rental receipts derived from tangible personal property would violate the commerce clause and leasing in the State of New York which does not tax rental receipts would not violate the commerce clause.

The commerce clause protects the nation's commerce. It is not limited to protection of commerce of some of the States.

> *Freeman v. Hewitt*, 329 U. S. 249;
> *Wheeling Steel Corporation v. Glander*, 337 U. S. 562.

In *Freeman v. Hewitt*, 329 U. S. 249, this Court said at page 256:

> "It is suggested, however, that the validity of a gross sales tax should depend on whether another State has also sought to impose its burden on the

transactions. If another States has taxed the same interstate transaction, the burdensome consequences to interstate trade are undeniable. But that, for the time being, only one State has taxed is irrelevant to the kind of freedom of trade which the Commerce Clause generated. The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment. Courts are not possessed of instruments of determination so delicate as to enable them to weigh the various factors in a complicated economic setting which, as to an isolated application of a State tax might mitigate the obvious burden generally created by a direct tax on commerce."

This Court further said, at page 257:

"Many States, for instance, impose taxes on the consumption of goods, and such taxes have been sustained regardless of the extra-State origin of the goods, or whether a tax on their sale had been imposed by the seller State. Such potential taxation by consumer States is but one factor pointing to the deterrent effect on commerce by a superimposed gross receipts tax."

Appellee urges that the decision in *Jackson Mining Co. v. Auditor General*, 32 Mich. 488, wherein a Michigan statute exempting from mining taxation all ore mined and reduced or smelted in Michigan was in violation of the commerce clause would have been different if there had been an equivalent use tax upon reduction or smelting. Appellee, in so urging, fails to note that states of reduction or smelting could likewise impose a like use tax upon reduction and smelting and thus interstate commerce would be exposed to multiple burdens. Furthermore, appellee, in

so urging, fails to take into cognizance that the tax here imposed was discriminatory in fact, because interstate commerce was involved.

It is quite obvious that the cases relied upon by appellee involving non-discriminatory taxes do not support the imposition of sales taxes upon sales for interstate leasing and leasing interstate and exempting from said sales taxes sales for intrastate leasing and leasing intrastate, nor do they support a tax 2½ times that which it would have been if the leasing had been intrastate instead of interstate.

APPELLANT IS A PROPER PARTY TO RAISE THE FEDERAL QUESTIONS

The Supreme Court of Michigan, in answering appellee's contention that appellant was not a proper party to raise the federal questions, said:

> "Appellant has questioned the right of plaintiff to challenge the validity of the statutory provision in question on the ground that it is not engaged in interstate commerce. However, the basic proposition at issue is the matter of discrimination, and the legal incident of the sales tax falls on the retailer of personal property. *Federal Reserve Bank of Chicago v. Department of Revenue*, 339 Mich. 587; *National Bank of Detroit v. Department of Revenue*, 340 Mich. 573; *United States v. City of Detroit*, 345 Mich. 601. Plaintiff paid the tax of which it now complains, and should be permitted to urge in court the invalidity of the statute requiring such payment. It is entiled to a determination on the merits. It does not appear that any person or corporation other than plaintiff can claim to have been prejudiced by the collection of said tax" (11a, 12a).

The tax here was imposed and assessed upon appellant. It was paid by appellant. Appellant is the champion of and stands upon its own right within the meaning of *Henneford v. Silas Mason Co.*, 300 U. S. 577 and *Duckworth v. Arkansas*, 314 U. S. 390. Appellant is a proper party to raise the federal questions. *Allied Stores of Ohio, Inc. v. Bower*, 3 L. ed 2d 480.

Appellee urges that appellee cannot claim discrimination because all Michigan retailers are subjected to a like tax. This begs the question. The question is not whether all retailers are subjected to the tax but whether the tax can be imposed on any retailer because it discriminates against interstate commerce and exposes said commerce to multiple burdens.

CONCLUSION

Appellant respectfully suggests that the federal questions are substantial and that appellant is a proper party to raise the federal questions.

Appellant respectfully requests that the motion to dismiss be overruled in all respects.

Respectfully submitted,

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